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JENNER & BLOCK LLP

July 28, 2019

Jeremy M. Creelan
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Via CM/ECF

The Honorable Timothy J. Sullivan
United States Magistrate Judge

Re: *NAACP, et al. v. Bureau of the Census, et al.*, No. 8:18-cv-0891 (D. Md.)

Dear Judge Sullivan:

Plaintiffs move pursuant to Federal Rule of Civil Procedure 37(a) to compel Defendants to (1) make available Patrick J. Cantwell, Chief of the Decennial Statistical Studies Division, for a deposition as soon as practicable, but in no case later than August 9, 2019; and (2) produce immediately the documents referred to by the Bureau's 30(b)(6) witness, Benjamin K. Taylor, and by fact witness Edward L. Kobilarcik by August 2, 2019. Based on publicly available information and the minimal discovery to date, Plaintiffs have sought leave to move for targeted emergency relief as the Census is set to commence in a matter of weeks. *See* Dkt. No. 146. Defendants' repeated delays in complying with Plaintiffs' reasonable requests, which fit squarely within the parties' agreed-upon and Court-ordered scope of discovery, cannot be used as a shield to deprive the Court of sufficient time to rule on the unconstitutional funding and planning of the Census. For these reasons, the Court should compel the deposition of Cantwell and the production of the documents referenced in the Taylor and Kobilarcik depositions.

1. Plaintiffs Are Entitled to Depose Cantwell As a Fact Witness

The parties agreed upon and the Court ordered expedited discovery in March 2019; pursuant to that agreement, Plaintiffs are entitled to three fact depositions. *See* Dkt. No. 85.

On July 15, Plaintiffs finally took their first fact deposition, of Edward Kobilarcik, the chief cost estimator at the Census Bureau. Kobilarcik testified repeatedly that the Bureau's cost estimators receive assumptions from other divisions of the Bureau, which provide the basis for estimating the cost of each component of the Census.¹ As part of his testimony, Kobilarcik stated that many key assumptions are given to the cost estimators by the Decennial Statistical Studies Division; Kobilarcik named Cantwell as the chief of that division, which is confirmed in public documents.

On July 16, Plaintiffs noticed the deposition of Cantwell for July 29.² Defendants did not respond. On July 24, Plaintiffs wrote Defendants seeking to confirm that Cantwell would appear for a deposition on the 29th. On July 25, counsel for Defendants replied as follows: "We will be moving for a protective order. There will be no deposition on Monday."³ Defendants have still not moved for a

¹ Defendants marked the entirety of both deposition transcripts confidential pursuant to the Protective Order, Dkt. No. 122, and thus Plaintiffs have not included excerpts with this motion. If the Court would like to review those excerpts, Plaintiffs will provide them under seal.

² The Notice of Deposition is attached as Exhibit A.

³ Counsels' email thread is attached as Exhibit B. In light of Defendants' unequivocal statement that they would seek a protective order, a further meet and confer would be futile.

protective order.

In any event, “[a] motion seeking to prevent the taking of a deposition is regarded unfavorably by the courts,” and a party so moving must demonstrate “good cause.” *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 124-25 (D. Md. 2009). Here, where Cantwell’s deposition falls squarely within the scope of discovery under Rule 26, no good cause exists.

The deposition of Cantwell is relevant to Plaintiffs’ claims. Plaintiffs claim that Defendants have violated the U.S. Constitution and the Administrative Procedure Act in their funding and planning of the Census. As part of these claims, Plaintiffs assert that the Bureau has based its cost estimates and design of the Census on unreliable assumptions about self-response rates, enumerator productivity, and other key components of the Census that directly affect whether Plaintiffs and other Hard-to-Count communities will be counted. According to the Bureau’s chief cost estimator, Cantwell is the chief of the division that provides key assumptions to the cost estimation staff. Cantwell is thus likely to have information important to proving Plaintiffs’ claims. Nor can Defendants claim that this fact deposition is disproportionate to the needs of the case—Plaintiffs have taken only *one* fact deposition of the three to which they are entitled under the parties’ agreement.

Nor should Defendants be heard to raise a blanket objection to Cantwell’s deposition on a ground of deliberative process privilege. Even if Cantwell’s testimony were protected by such privilege in some part, that would not justify withholding his deposition in its entirety. Objections to specific lines of inquiry may be noted on the record or heard by this Court during the deposition itself if needed. Moreover, Plaintiffs are not seeking information about assumptions that were rejected or left on the cutting room floor; rather, they seek evidence regarding the support for – or absence of such support for – those assumptions adopted by the Bureau and contained in the 2019 LCCE cost estimates. Such material is not protected by the deliberative process privilege under the applicable case law. *See Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248-49 (4th Cir. 1994). In any event, Defendants have provided no reason for this Court to conclude that Plaintiffs’ compelling need to obtain information regarding the assumptions the Bureau has adopted for the 2020 Census would not overcome such protection.

2. Defendants Must Produce the Requested Documents

On July 16, 2019, Plaintiffs served requests for production of documents referenced by Taylor and Kobilarcik in their deposition testimony.⁴ As the letter requesting the documents explains, the requested documents are fully responsive to Plaintiffs’ first set of requests for production. After not receiving a response, counsel for Plaintiffs wrote to counsel for Defendants to inquire about the status of the document requests on July 24. Defendants have still not responded to the July 16 requests. The Court should order immediate production of the requested documents.

During their respective depositions, Taylor and Kobilarcik referred repeatedly to Bureau documents underlying the 2019 Lifecycle Cost Estimate and Basis of Estimate (“BoE”). These documents, as listed in Plaintiffs’ July 16 letter requesting their production, include documentation of the Bureau’s key analyses of in-field address canvassing, productivity rates for Census field staff, criteria for using contingency funds, an independent cost estimate used to develop the BoE, assumption tables with information about the key assumptions underlying the BoE, and a risk register listing the risks to the Census and trigger events for those risks as defined by the Bureau.

⁴ Plaintiffs’ requests are attached as Exhibit C.

The requested documents contain the analyses and assumptions that are the basis of the BoE. As Kobilarcik testified, the Bureau does not expect to make further substantive changes to the BoE. The Court previously found that other documents underlying the BoE are relevant and not protected by the deliberative process privilege. *See* Opinion, Dkt. No. 142. The same rationale requires production of the documents requested on July 16. Not only are these documents responsive to Plaintiffs' initial requests for production, they are also the bases for an agency decision that has been made, namely the BoE.

Respectfully submitted,

/s/ Jeremy M. Creelan

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Casey Gilfoil,* Law Student Intern
Daniel Ki,* Law Student Intern
Nikita Lalwani, Law Student Intern
Joshua Zoffer, Law Student Intern
Renee Burbank (Bar No. 20839)
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*Counsel for Plaintiffs NAACP and Prince
George's County NAACP Branch*

* Law student interns. Petition to practice forthcoming.

† This letter does not purport to state the views of Yale Law School, if any.

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NAACP, *et al.*,

Plaintiffs,

v.

BUREAU OF THE CENSUS, *et al.*,

Defendants.

Case No. 8:18-cv-00891-PWG

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure and the Order entered by the Court on March 11, 2019, ECF 85, Plaintiffs NAACP et al., through counsel, will take the deposition of Patrick J. Cantwell, Chief of the Decennial Statistical Studies Division, U.S. Census Bureau on July 29, 2019, beginning at 10:00 am, in the Washington, D.C. office of Jenner & Block, 1099 New York Ave., Suite 900, Washington, DC 20001-4412.

The oral examination shall be before a notary public or other person authorized by law to administer oaths, for purposes of discovery or use as evidence in this case, or both. The deposition shall be recorded by stenographic means. The deposition will continue for seven hours or less, per the Court's scheduling order, ECF 89.

Respectfully submitted,

Rachel Brown, Law Student Intern
Casey Gilfoil,* Law Student Intern
Daniel Ki,* Law Student Intern
Nikita Lalwani, Law Student Intern
Joshua Zoffer, Law Student Intern
Renee Burbank (Bar No. 20839)
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/s/ Jeremy M. Creelan

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Exhibit B

Gowdey, Logan J.

From: Lynch, Christopher M. (CIV) <Christopher.M.Lynch@usdoj.gov>
Sent: Thursday, July 25, 2019 8:22 AM
To: Gowdey, Logan J.
Cc: Ehrlich, Stephen (CIV); DL_Jenner-NAACP; naacp@mailman.yale.edu; Michael Wishnie; Renee Burbank; Brad Berry; balter@naacpnet.org
Subject: Re: NAACP v Census, Notice of Deposition

External Email – Exercise Caution

Logan,

We will be moving for a protective order. There will be no deposition on Monday.

Best,
Chris

On Jul 24, 2019, at 8:24 PM, Gowdey, Logan J. <L.Gowdey@jenner.com> wrote:

Dear Chris,

Please confirm that Patrick Cantwell will appear for a deposition on July 29, at Jenner's Offices in Washington DC, starting at 10:00 am. Thank you.

Best,

Logan

From: Gowdey, Logan J.
Sent: Tuesday, July 16, 2019 5:40 PM
To: 'Christopher.M.Lynch@usdoj.gov' <Christopher.M.Lynch@usdoj.gov>; 'Stephen.Ehrlich@usdoj.gov' <Stephen.Ehrlich@usdoj.gov>
Cc: DL_Jenner-NAACP <DL_Jenner-NAACP@jenner.com>; naacp@mailman.yale.edu; 'Michael Wishnie' <michael.wishnie@ylsclinics.org>; Renee Burbank <renee.burbank@YLSCLinics.org>; Brad Berry <bberry@naacpnet.org>; balter@naacpnet.org
Subject: NAACP v Census, Notice of Deposition

Chris—

We would like to take the deposition of Patrick Cantwell, Chief of the Decennial Statistical Studies Division, on July 29. See attached notice. Please confirm he is available on that date.

Best,

Logan

Logan J Gowdey

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Exhibit C

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July 16, 2019

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Via CM/ECF

Christopher M. Lynch
Trial Attorney
Civil Division
Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005

Re: *NAACP, et al. v. Bureau of the Census, et al.*, No. 8:18-cv-00891 (D. Md.)

Dear Chris:

Following up on our depositions, Plaintiffs submit this letter to request documents referred to by Benjamin Taylor and Edward Kobilarcik during their depositions of July 12 and 15, respectively. The documents requested are responsive to Plaintiffs' initial set of document requests:

- Mr. Taylor testified that there is in the Bureau's possession documentation of the analysis that produced the 38.4% rate of in-field address canvassing that was adopted as an assumption to support the cost estimates within the 2019 LCCE. We request production of that documentation pursuant to Request for Production No. 1. This includes, but is not limited to, the "heat map" of the in-field address canvassing workload demonstrating address canvassing workload levels across the country.
- Mr. Taylor testified that there was documentation of the analysis that supported the increased rates of productivity for listers (from 11.01 to 15.84 cases per hour) and the decrease in average wages per lister that were adopted as an assumption in support of the 2019 LCCE's cost estimates, and that he had reviewed those documents. We request production of that documentation pursuant to Request for Production No. 1.
- Mr. Taylor testified that there was documentation at the Bureau of the analysis that led to the increased productivity rates for enumerators (from 1.27 to 1.55 cases per hour) in responding to the NRFU workload that were adopted as an assumption in support of the cost estimates in the 2019 LCCE, based on an analysis of the 2010 Census results and the 2018 End-to-End Test in Providence, RI. We request production of that documentation pursuant to Request for Production No. 1.

- Mr. Taylor testified that he had seen documentation tracking the Bureau's progress in hiring partnership specialists. We request production of that documentation pursuant to Request for Production No. 1.
- Mr. Taylor testified that there were criteria for using the Secretarial Contingency and other contingency funding in a governance document published by the Bureau, which supports the 2019 LCCE. We request production of that documentation pursuant to Request for Production No. 1.
- Mr. Taylor testified on re-direct that there was an independent cost estimate conducted for the 2020 Census, which arrived at a total cost of the Census of \$14.1 billion. We request production of that documentation pursuant to Requests for Production No. 1 and 2.
- Mr. Kobilarcik testified that the 2019 LCCE BOE was developed using "assumption tables" which contain the assumptions used by the Bureau's cost estimators, and also include the range in the cost estimate due to uncertainty about each component. We request production of that documentation pursuant to Request for Production No. 1.
- Mr. Kobilarcik testified that there is a risk register containing information about risks to the Census that contains information about trigger events and how each risk was estimated. We request production of that documentation pursuant to Requests for Production Nos. 1 and 2.

Plaintiffs request that the above-referenced documents be produced by Monday, July 22.

Respectfully submitted,

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Casey Gilfoil,* Law Student Intern
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Nikita Lalwani, Law Student Intern
Joshua Zoffer, Law Student Intern
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/s/ Jeremy M. Creelan

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